UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCOTT C., a minor individual, by and through his parents and natural guardians, SHARON C. AND PETER C. and SHARON C. AND PETER C., individually: Plaintiffs,	:	No. 02-CV-4023
v.	:	
COLONIAL INTERMEDIATE UNIT 20 Defendant.	:	

BRIEF OF DEFENDANTS COLONIAL INTERMEDIATE UNIT 20 IN OPPOSITION TO PLAINTIFF S MOTION FOR SUMMARY JUDGMENT

Defendant,Defendant, Defendant, ColonialDefendant, Colonial Defendant, Colonial I attorneysattorneys of record, King, Spry, Hermaattorneys of record, King, Spry, He followinfollowingfollowing brief in opposition to Plaintiff s Motion for Summary Judgr The undisputed facts of record are as follows:

A. PROCEDURAL HISTORY

PlaintifPlaintiffsPlaintiffs filed a Complaint against Defendant ClU2Plaintiffs filed a C 2002,2002, and serve2002, and served u2002, and served upon Defendant on or abou DismissDismiss underDismiss under 12(b)(6) was filed by Defendants on October 1, 2002.D thenthen filed a Response to Defendant sthen filed a Response to Defendant s Motionth forfor Summary Judgmefor Summary Judgment withfor Summary Judgment with a discovery has been taken as yet in this case.

B. STATEMENT OF FACTS

ScottScott C. is a student inScott C. is a student in the BethlehemScott C. is a studer residesresides with his parentresides with his parents. resides with his parents. Sco learninglearning disabilities and alearning disabilities and as belearning disabilities District.

InIn September 1998, Scott C. began exhibiting behavioralIn September 1998, Sc schoolschool.school. A psychiatric evaluation was conducted and the psychiatrs recommendedrecommended a partial hospitalization progrrecommended a partial h hospitahospitalizhospitalizationhospitalization program at Nitschmann Middle Schoo SchoolSchool District until the end of hiSchool District until the end of his eigSchool D programprogram at Freedom High Schoprogram at Freedom High Schooprogram at Fr there until his tenth grade year.

PPlaintiffsPlaintiffs have set forth an eight (8) page factual statementPlaintiffs brief.brief. Howeverbrief. However, Plbrief. However, Plaintiff s brief continually cite inin support of her Summary Judgment brief. Accordingly, allin support of her Su culledculled from Plaintiffs Complaint in their Brief in support of their Summary Judgment Motion should be considered factual issues.

C. ISSUES PRESENTED

I. WHETHER THIS CASE IS NOT YET RIPE FOR SUMMARY JUDGMENT?

Suggested Answer: Yes.

II.II. WHETHER THEREII. WHETHER THERE IS A GENUINE ISSUE OF MATERIAL FACTII. WI WHETHERWHETHER CIU20 EMPLOYEES ARWHETHER CIU20 EMPLOYEES ARE THEWH UNDER THE BORROWED SERVANT DOCTRINE ?

Suggested Answer: Yes.

III.III. WHETHER PLAINTIFFIII. WHETHER PLAINTIFFS III. WHETHER PLAINTIFFS FAIL DEFENDANT CIU UNDER IDEA, §504 AND §1983?

Suggested Answer: Yes

D. ARGUMENT

STANDARD FOR SUMMARY JUDGMENT MOTION

PursuantPursuant to Rule 56(c) of the Federal RulesPursuant to Rule 56(c) of the Fed judgmjudgmentjudgment may be entered only if the pleadings, depositions, answe interrogatories,interrogatories, and admissions on file, together with affidavits, if any, s thatthat there is no genuine issue as to any material fact and that the moving partyparty is entitled to a judgment as a matter oparty is entitled to a judgment a MiningMining EqMining EquipmenMining Equipment co., 667 F.2d 402, 405 (3d Cir. 1981) entitledentitled to a judgment as a matter ofentitled to a judgment as a matter of la establishestablish the existence of a genuineestablish the existence of a genuine issueest onon which she has on which she has thon which she has the burden of proof at tria 1391,1391, 1395 (3d Cir. 1989), *citing* Celotex Corp. v. Catrett, 477 U.S., 477 U.S. 317,, 477 U.S.

265, 106 S.Ct. 2548265, 106 S.Ct. 2548 (1986). A265, 106 S.Ct. 2548 (1986). A genuine issu viewedviewed in a light most favorable toviewed in a light most favorable to the n reasonablereasonable jury to return a verdict for that party.reasonable jury to retur LiberLibertyLiberty Lobby, Inc., 477 U.S. 242, 248-49, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) If If the evidence is merely colorable or is not significantly probative, summary judgmentjudgment may be granted. Whether a fact judgment may be granted. W substantive law. *Id.* (inner citations omitted.)

The The primary purpose of a motion for summary judgment is to avoid a uselessuseless trial, and summary judgment is a procedural device for promptly disposingdisposing of actions in which theredisposing of actions in which there isdisp eveneven though such iseven though such issue might heven though such issue migh veryvery very purpose overy purpose of Rule 56 is to eliminate a trial in such cases w unnecessaryunnecessary and results inunnecessary and results in delay and expense. To InsuranceInsurance CompaInsurance CompanInsurance Company, 494 F.2d 882, 884 (3d Fund, Inc., 463 F.2d 495, 498 (7th Cir. 1972).

TheThe Third Circuit has made it clear that The Third Circuit has made it clear that co asas to the existence of geas to the existence of genas to the existence of ger Hollinger,, *supra*;; Ness v. Marshall, 660 F.2d, 660 F.2d 517, 519 (3d Cir. 1981). In addition, inferences inferences to be drawn from the underlying facts contained in evidenti in sourcessources submittedsources submitted to the trial court must besources submitte

toto the party opposing the motion. GoodmanGoodman v. Mead JohnsonGoodman v.
566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2
(1977).(1977). A Court considering a summary judgment motion based solely on(1977). A
administrativeadministrative decision under IDEA follows a slightly modified rule.[1] F
purposespurposes of the purposes of the prespurposes of the present motion, h
standard rule because: 1) the ClU20rule because: 1) the ClU20 is nrule because: 1) t
decision,decision, and; 2) Plaintiffs incldecision, and; 2) Plaintiffs inclusion odecision, a
fall under any part of any administrative record.

I. THIS CASE IS NOT YET RIPE FOR SUMMARY JUDGMENT

UponUpon receiUpon receipt ofUpon receipt of Plaintiffs Complaint, Defenda
DismissDismiss under 12(b)(6)Dismiss under 12(b)(6) alleging that Plaintiffs Complaint faile
ofof action against ClU20. Plaintiffs responded by filing a combof action against ClU2
ResponseResponse to Defendant s Motion and a Brief in support of Response t
Judgment.Judgment. Judgment. Plaintiffs also filed a 1240 pageJudgment. Plaintiffs al
TTheThe Appendix was comprised of documents of record in a caseThe Appendix was

[1] Noting that summary judgment Noting that summary judgment in a judicial review of an administrat
thethe IDEA ithe IDEA is different ,the IDEA is different , the Court in Breen v. St. Charles R-IV School Dist
(E.D. Miss. 1997), concluded:

> JudicialJudicial review of agency action may be conducted on the administrative record even *ifif thereif there are disputed issues of material fact.* Under. Under IDEA, the reviewing court bases its decision o thethe preponderance of evidence. That is a less deferential standard of reviewthe preponderance of evidence evidenceevidence testevidence test common to federal administrative law. But it still requires the reviewing court due due weight to administrative decision making. Breen, 2 F.Supp.2d a, 2 F.Supp.2d at 1220 (em, 2 F.Su citations omitted)

thanthan two years ago against Bethlehem Area School District, in which ClU20 waswas not a a a p a party. The documents were not previously produced to Defendant. No discovery has been taken as yet in the case at bar.

Fed.R.C.P. 12(b)(6) states in pertinent part:

> ...If, ...If, on a mot ...If, on a motion ass ...If, on a motion asserting the defense failurefailure of the pleading to state failure of the pleading to state a claif granted,granted, matters outside the pleading are pgranted, matters outsic excludedexcluded by the court, the motion shall be treated as one for summary judgment, and disposed ofjudgment, and disposed of as provided in Rulejudgme *bebe given reasonable opportunity to present be given reasonable oppor pertinent* to such a motion by Rule 56.

F.R.C.P. 12(b)(6) (emphasis added)

TheThe partiesThe parties may pThe parties may produce affidavits and oth supportsupport or support or in oppositisupport or in opposition to a motion for fail MotorMotor Co. v. SummitMotor Co. v. Summit Motor Prods., Inc.,, 930 F.2d 277 (3d Cir.) c U.SU.S.U.S. 939, 112 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 324 (1991). *See* Lybrook v. Mer FarmingtonFarmington Mun. Schools Bd. of Educ., 232 F.3d 1334,, 232 F.3d 1334, 2000)(court2000)(court has discretion whether to consid2000)(court has discretion whe doesdoes not consider such evidence, conversion is not required); Finley Lines JointJoint Protective Bd. Unit 200 v.Joint Protective Bd. Unit 200 v. NoJoint Protective (4th Cir. 1997)(noting that conversion requirement does not vest unti Cir. 1997)(notir courtcourt decides to consider the extrinsic materials; *mere merely subm mer exextraneousextraneous materials does not trigger a conversion*)(emphasis added).)(er

courtcourt must give all parties notice of such a converscourt must give all parties n
withwith an opportunitywith an opportunity bothwith an opportunity both to be he
supportsupport of their positisupport of their positionssupport of their positions on
TownTown of Loma Linda, 213 F.3d 101,, 213 F.3d 101, 1005 (8th Cir. 2000); David v.David v.
101101 F.3d 1344, 1352 (10th Cir. 1996), Cir. 1996), *cert. denied*, 522 U.S. 858, 118 S.Ct. 157, 13
L.Ed.2dL.Ed.2d 102 (1997); JonesJones v. Automobile Ins. Co., 917 F.2d 1528 (11th Cir. Cir. 1
FollowingFollowing conversion, the courtFollowing conversion, the court is likelyFollo
appropappropriateappropriate discovery before ruling on the converted motion.
Baicker-McKee, et al., Federal Civil Rules Handbook 310 (2002).

InIn the instant case, a Motion to Dismiss was the filn the instant case, a Motion t
Defendant.Defendant. No answer or affirmative defenses to Plaintiffs Complaint have
beenbeen filed, nor has been filed, nor has therebeen filed, nor has there been filed, nor h
maymay be granted onlymay be granted only after the nonmoving party has had anma
forfor discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct., 477 U.S. 317, 322, 10
91 L.Ed. 2d 265 (1986).

Pre-discoveryPre-discovery summary judgments should more appropriately be th
exceexceptexception,exception, rather than the rule. *See* Patton v. General Signal
F.Supp. 666, 670 (W.D.N.Y. 1997)(commenting that pre-discovery summary
judgmentjudgment remains the exception rather than the rule, and will be grantjudg
only in the clearest of cases).

CIU20CIU20 has affirmative defenses independent of BASD and has not had thethe opportunity to raise them. CIU20the opportunity to raise them. CIU20 intendsthe ofof the Statute of Limitations under Bernardsville Bd. of Ed. v.Bernardsville Bd. of Ed. v. (3d(3d Cir. 1994) and Montour School District v. S.T., Pa.Cmwlt, Pa.Cmwlth. LEXIS 598, 8 A.2d 29 (2001).

TheThe record attached by PlaiThe record attached by PlaintiffsThe record att includesincludes depositionsincludes depositions taken in the case against BASD , appel heahearinghearing ofhearing officer opinions. As CIU20 was not a party in that case, havehave the opportunity to participate in thhave the opportunity to partic examinationexamination of witexamination of witnexamination of witnesses. A-104;A-13 287;A-307;A-329;A-365;287;A-307;A-329;A-365;A287;A-307;A-329;A-365;A-385;A-399;A-423;A- hearings,hearings, CIU20 was never ahearings, CIU20 was never a respondenthearings, CI respondrespond to Plaintiffs allegations.respond to Plaintiffs allegations. It is unquest thethe underlying administrative hearings wasthe underlying administrative hearings w 88

Plaintiffs Plaintiffs attPlaintiffs attempt to Plaintiffs attempt to introduce CIU2 stagestage of the proceestage of the proceedings is stage of the proceedings is hig BethlBethlehemBethlehem case at 00-CV-642 indicates that a trial schedule has been se JanuaryJanuary 10, 2003, which is lessJanuary 10, 2003, which is less thanJanuary 10, 200 extensiveextensive discovery taken in which CIU has notextensive discovery taken in whi

waswas initiated by Plaintiff on February 3, 2000. Plaintiffs had mowas initiated by Plai yearsyears to join CIU20years to join CIU20 as a paryears to join CIU20 as a party and ma twotwo year period to do so. Now that the initial ltwo year period to do so. N Plaintiffs Plaintiffs attempt to insert CIU20 at thePlaintiffs attempt to insert CIU20 at the

BasedBased on the foregoing, Plaintiffs failed to meet theirBased on the foregoing mattermatter is ripe for Summary Judgment. Plaintiffs Motionmatter is ripe for Judgment should be dismissed.

II.II. THERE IS A GENUINE ISSUE OF MATERIAL THERE IS A GENUINE ISSUE OF WHETHERWHETHER CIU20WHETHER CIU20 EMPLOYEES ARE THE BORROWED SERVA UNDER THE BORROWED SERVANT DOCTRINE

ThereThere exists a genuine issue of fact asThere exists a genuine issue of fac independentindependent contractor or borrowed servant *vis`a vis* as a as a co-L a factualfactual issue upon which this factual issue upon which this cfactual issue up employer of the CIU20employer of the CIU20 employees who provided services toempl The CIU20 employees were The CIU20 employees were the borrowed servants of Bethleh District.District. BASD actuallyDistrict. BASD actually superDistrict. BASD actually buibuildingbuilding anbuilding and controlled the manner of their work and therefo liable to Plaintiffs.

PennsylvaniaPennsylvania law on the borrowed servant doctrine is set out in Walto v. Harold M. Kelly, Inc., 269 A.2d 347, 349-50 (Pa.Super. 1970):

> OneOne who is in the general employ of another may, with respect to certaincertain work, be transferredcertain work, be transferred to the service of

wayway that he becomes, for the first time being and in the pway that he be
service which he is engaged to perform, an employee of that person.

KhanKhan v. Accurate Mold, Inc., 82 F.Supp.2d 381 (E.D. Pa. 2000); Fitzpatrick v.v. Consolidated Rail Corp., 1992 U., 1992 U.S. Dist., 1992 U.S. Dist. LEXIS 11615 (E.D. P Walton at 349-350.

Further,Further, the third person, the allegedFurther, the third person, the controlcontrol ncontrol not only thecontrol not only the work the employee is to do b performanperformance.performance. Fitzpatrick *citing* Hamler v. Waldron, 284 A.2d 1970);1970); Farmers Export Co. v. Energy Terminals, Inc., 673 , 673 F.Supp, 673 F.Supp. (E.D.Pa.(E.D.Pa. 1987)(*citing* WaltWalton, 2, 269 A.2d at 349). The most important factor determiningdetermining whether the employee has becomedetermining whethe borrowingborrowing emborrowing employer is the degree to which the borrow exercisesexercises control over theexercises control over the employee. Fitzpatrick *citir* 826826 F.2d826 F.2d 1255 (3d Cir. 1987)(Third Circuit cites Restatement (Second) of826 F.2d in determining issue on appeal from Virgin Islands).[2]

---

[2]TheThe Eastern District Court listed seven factors that should be considered in detThe Eastern Distric whether an employee is a borrowed servant, only six of which are applicable here:

1.1. One who is in the general employ of one employer may be transferredOne who is in the ge service of another in such aservice of another in such a mannerservice of another in such a the second employer;

2.2. Whether or not the transferredWhether or not the transferred employee is borrowed,Whether thethe first employer passes to the secondthe first employer passes to the second employerth the employee s work but also the manner of performing it;

3.3. ItIt is enough toIt is enough to establish the employer-employeeIt is enough to establish the has the right to control the employee s manner of performance of work;

NotwithstandingNotwithstanding whether or not CIU20 employees wereNotwiths servantsservants of BASD for purposes of liservants of BASD for purposes of liabserva UnderUnder Pennsylvania law, the jury is the fact-finder as to whether thereUnder P master-servantmaster-servant relationship, and also asmaster-servant relationship, and v.v. Stoltzfus, 2000 U.S. Dist. LEXIS 15441 (E.D. Pa. 2000)(One is, 2000 U.S. Dist. LEXIS 15441 (E.D thethe negligence of another, unless there is a relationship of master and servantservant or principle and agent; the jury determines wheservant or principl master-servantmaster-servant relationship);Mauk v. Finkler, 367 F.Supp., 367 F.Sup 19731973)(There1973)(There is no question that under the law of Pennsylvania, the scop thethe authority or employment of an agent or servant is a factual issue for jury determination;determination; the test of whether the factual issue should reachdeter turnsturns on whether any reasonable inference from the faturns on whether any findingfinding tfinding thfinding that the employee was acting in furtherance of

****(The****(The fourth factor which****(The fourth factor which the Court lists is specifically tailored which are treated differently by the Pennsylvania Supreme Court.

5.5. FactsFacts which indicate that anFacts which indicate that an employee remainsFacts which indicate includeinclude original employer s right to selinclude original employer s right to select th dischargedischarge him at any time and send another in hdischarge him at any time and send possessionpossession of a skill or special training requpossession of a skill or special train employer, and employment at a daily or hourly rate for no definite period;

6. TheThe fact the second employer designates the work to be done and wThe fact the second empl done does not militate against the first employer-employee relationship; and

7.7. WhenWhen the facts areWhen the facts are undisputed, the determination of who is theWhen the fac is one of law, but when the facts are disputed the question is one of fact.

Fitzpatrick *citing* Smart v. Ashland Chemical, Inc., 1992 WL 10476 at n2 (E.D. Pa. 1992)

business);Stine v. Borst, 205 Pa. Super. 46, 205 A.2d 650 (Pa.Super. 1964)

InIn the caseIn the case at bar, the deposition testimony of several CIU20 employees raisesraises theraises the issue as to the status of CIU20 as an independent contracto borrowedborrowed servant for BASD and whether CIU20borrowed servant for BASD an it s employer s (BASD) business:

> Q....YouQ....You said that you were the special educatiQ....You said that you wer BethlehemBethlehem Area ScBethlehem Area School DisBethlehem Area School youyou wereyou were hired andyou were hired and paid by Colonial Intermediate whywhy duringwhy during the two years youwhy during the two years you serve school district you were paid and hired by the Intermediate Unit?
>
> A.A. I was hired by the IntermediateA. I was hired by the Intermediate Unit. It wa BBeBethlehemBethlehem contracted with the Intermediate Unit to provide spe education supervision services to the district.
>
> (N.T. Nancy Laurence, A-288-289)
>
> Q.Q. ...Would you explain what that rQ. ...Would you explain what that relatiQ. .. Area School District?
>
> A.A. Yes. The Intermediate Unit is a consortion of sorts that proviA. Yes. The specialspecial servispecial services to ouspecial services to our intermediate un districts,districts, Bethlehem being one of those school districts.districts, Bethleh payspays a proportionatepays a proportionate amount, depending onpays a prop we are serving.
>
> Q.Q. Depending on the number of students iQ. Depending on the numb programsprograms or receiving Intprograms or receiving Inteprograms or rec work?
>
> A.A. Everyone pays an equal portion for ovA. Everyone pays an equal por IntermediateIntermediate Unit. Intermediate Unit. ThenIntermediate Unit. Then oneone oone of our programs, the district is charged an amount per cone o depending on the services they are receiving.

> We also act asWe also act as consultants toWe also act as consultants to the schoo
> II was not providing direct seI was not providing direct service to ScI was not
> consultative basis.
>
> (N.T. Margie DeRenzis, A-367-368)
>
> Q. Who is your employer?
>
> A.A. Let me explain this,A. Let me explain this, because I know this question has be
> thatthat you understand fthat you understand fully. that you understand fully.
> educationeducation ineducation in the Bethlehem Areaeducation in the Bethlehe
> aa district employa district employee. The a district employee. The previous e
> ColonialColonial Intermediate Unit 20.Colonial Intermediate Unit 20. It was an arran
> thethe dithe district and the Intermediate Unit. The district paid thth
> Intermediate Unit for administrative oversight.
>
> So,So, So, the So, the Intermediate Unit, through that agreement, pro
> administrativeadministrative administrative oversightadministrative oversight adr
> eighteight years that I talked about previous to the diseight years that I talked a
> this year.
>
> (N.T. Richard Agretto, A-401)

TheThe questThe question of ClU20's relationship with BASD is clearly a question factfact to be determined by the jury. Accordingly, Plaintiffs Motion for Summary Judgment should be dismissed.

III.III. III. PLAIII. PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION AGA DEFENDANT ClU UNDER IDEA, §504 AND §1983

ToTo the extent that Plaintiffs incorporate their Motion & BrTo the extent th againstagainst BASD in the matter docketed at 00-CV-642 (pg.against BASD in the matter toto Dismiss and Motionto Dismiss and Motion for Summary Judgment), Defendant ClU20 andand incorporates the arguments set forth inand incorporates the arguments set fort

BriefBrief in Opposition to Plaintiffs MotionBrief in Opposition to Plaintiffs Motion for forfor Summarfor Summary Jufor Summary Judgment and Motion for Disposition on Record in Scott C. v. BASD docketed at 00-CV-642.

E. CONCLUSION

ForFor the foregoing rFor the foregoing reasonFor the foregoing reasons, Plain should be dismissed.

KING, SPRY, HERMAN, FREUND & FAUL

_____

John E. Freund, III, Esquire
One West Broad Street, Suite 700
Bethlehem, PA 18018
610.332.0390
ID 25390